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In The

Supreme Court of the United States

CALIFORNIA DEMOCRATIC PARTY, CALIFORNIA REPUBLICAN PARTY, LIBERTARIAN PARTY OF CALIFORNIA and PEACE AND FREEDOM PARTY, *et al.*,

Petitioners,

v.

BILL JONES, SECRETARY OF STATE OF CALIFORNIA and CALIFORNIANS FOR AN OPEN PRIMARY,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

Whether California's new blanket primary law – which allows voters of any political affiliation to cross party lines at will and to vote in other parties' primaries – violates the First Amendment rights of political parties to associate and to choose their own nominees.

Whether the associational rights of political parties are afforded less protection under the First Amendment than the associational rights of other private associations.

PARTIES TO THE PROCEEDINGS

Parties to the proceedings in the Court of Appeals were:

- the California Democratic Party, the California Republican Party, the Libertarian Party of California, the Peace and Freedom Party, Art Torres, Kathy Bowler, Paul Jorjorian, Gail Lightfoot, and C.T. Weber, petitioners herein;
- Bill Jones, Secretary of State of California, and Californians for an Open Primary, who are respondents herein;
- Michael Schroeder, Shawn Steel, and Donna Shalansky, who were appellants below but who have made no appearance here.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet.App. 1a-44a)[1] is reported at 169 F.3d 646. The opinion of the United States District Court for the Eastern District of California (Pet.App. 45a-85a) is reported at 984 F.Supp. 1288.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on March 4, 1999. Petitioners filed a petition for rehearing with suggestion for rehearing en banc, which was denied on June 4, 1999. The petition for certiorari was filed on September 2, 1999, and was granted on January 21, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The full text of California's new blanket primary law is at Pet.App. 89a-96a. The key provisions are new California Elections Code sections 2001 and 2151, which state in pertinent part:

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[1] "Pet.App." refers to the appendix to the petition for certiorari. "J.A." refers to the parties' Joint Appendix. "R.T." refers to the reporter's transcript. "Pl.Ex." refers to petitioners'/plaintiffs' exhibits. "Def.Ex." refers to respondents'/defendants' exhibits.

2001. All persons entitled to vote, including those not affiliated with any political party, shall have the right to vote, except as otherwise provided by law, at any election in which they are qualified to vote, for any candidate regardless of the candidate's political affiliation.

* * *

2151. At the time of registering and of transferring registration, each elector may declare the name of the political party with which he or she intends to affiliate at the ensuing primary election. The name of that political party shall be stated in the affidavit of registration and the index.

The voter registration card shall inform the affiant that any elector may decline to state a political affiliation, and that all properly registered voters may vote for their choice at any primary election for any candidate for each office regardless of political affiliation and without a declaration of political faith or allegiance. The voter registration card shall include a list of all qualified political parties.

STATEMENT

In March 1996 California voters adopted a statutory initiative, Proposition 198, that completely reworked California's primary election law. Before Proposition 198, parties chose their nominees at a primary election where only party members could vote. Each party's nominee, plus any independent candidates, then squared off in a general election. Under Proposition 198, California now

uses a "blanket primary" system that allows voters of any political affiliation to cross party lines at will and to vote in other party primaries. Four political parties – the California Democratic Party, the California Republican Party, the Libertarian Party of California, and the Peace and Freedom Party – and certain party officials sued to enjoin implementation of Proposition 198. The question presented by this case is whether California's new blanket primary law violates the right of political parties and their members to associate and to choose their own nominees.

A. California Partisan Primaries Before Proposition 198.

For about the first 50 years of California's existence as a state, party nominations were made at conventions:

> At the time of the constitutional convention of 1879, as when our first Constitution was adopted in 1849, a candidate's name could be placed on the ballot only if he was nominated by a political party meeting in convention. For many years, the Legislature exercised but little authority in this field, and the selection of delegates to, and the conduct of, the nominating conventions were usually left to party organizations. In 1897 (Stats. 1897, p. 115) the Legislature provided for nomination by petition of electors. This legislation was held unconstitutional. (*Spier v. Baker*, 120 Cal. 370 [52 P. 659 (1898)].) A further legislative effort to modify and control the machinery of elections was also held unconstitutional. (*Britton v. Board of Commrs.*, 129 Cal. 337 [61 P. 1115 (1900)].)

Jones v. McCollister, 159 Cal.App.2d 708, 711, 324 P.2d 639 (1958).

The California Constitution was amended in 1900 and again in 1908 to allow increased legislative control of primary elections. The 1908 amendment (Art. II, § 2½) explicitly required primary elections:

> the Legislature shall enact laws providing for the direct nomination of candidates for public office, by electors, political parties, or organizations of electors without conventions at elections to be known and designated as primary elections[.]

Socialist Party v. Uhl, 155 Cal. 776, 780 (1909). The Primary Election Law of 1909 created a closed primary[2] and California partisan primaries remained closed until the adoption of Proposition 198. *Id.* at 793.

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[2] American primary elections fall into three broad categories:

> *Closed Primary* – Voters declare a party preference prior to voting and then vote only in the party they have declared. This system is "closed" in the sense that each party primary is closed to voters who have not declared a preference for that party.
>
> *Open Primary* – Voters may vote the ballot of only one party, but make that choice in the privacy of the polling place. This system is "open" in the sense that each party primary is open to all voters, but each voter may vote for candidates of only one party.
>
> *Blanket Primary* – Voters may vote for any candidate in any race. The voter's party preference has no effect – each voter gets the same ballot and can vote for any candidate on the ballot.

984 F.Supp. at 1291-1292 (Pet.App. 52a-54a); Pl.Ex. 7, p. 2; R.T. 635-636 [Costantini Report].

California law allows electors to register or re-register up to 29 days before an election. Cal. Elec. Code § 2107. Thus, the effect of California's prior closed primary law was to require voters to register with a party at least 29 days before the primary if they wanted to vote in that party's primary.

The highest vote-getter in each party's primary becomes that party's nominee in the ensuing general election, and each party nominee appears on the general election ballot followed by his or her party affiliation. Cal. Elec. Code §§ 15451, 13105(a). The only candidates who appear on the general election ballot with a party affiliation are those who win their party's nomination at the primary. California also allows independent candidates to appear on the general election ballot. These independent candidates do not run in the primary – they submit petitions bearing nominating signatures and, if sufficient signatures are submitted, appear on the general election ballot as "independent." Cal. Elec. Code § 8300 et seq.; § 13105(c).

At present there are seven ballot-qualified parties in California.[3] The Republican and Democratic parties have been ballot-qualified since the first primary elections held at the beginning of the 20th Century. The Libertarian

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[3] A party becomes ballot-qualified if it meets any of the following conditions: (a) at the preceding gubernatorial election, any of its statewide candidates received 2% or more of the statewide vote, (b) voters equal to 1% of the vote at the preceding gubernatorial election affiliate with the party, or (c) voters equal to 10% of the vote at the preceding gubernatorial election sign and file a petition to form a new party. Cal. Elec. Code § 5100.

Party qualified in 1980. J.A. 46; R.T. 635-636 [Winger Report]. The Peace and Freedom Party qualified in 1968. *Ibid.*

B. The Adoption of Proposition 198, and the Changes Wrought by It.

Proposition 198 is a statutory initiative that was adopted at the March 1996 primary election.[4] The guts of Proposition 198 are contained in new Elections Code sections 2001 and 2151, which state in pertinent part:

> 2001. All persons entitled to vote, including those not affiliated with any political party, shall have the right to vote, except as otherwise provided by law, at any election in which they are qualified to vote, for any candidate regardless of the candidate's political affiliation.
>
> * * *
>
> 2151. At the time of registering and of transferring registration, each elector may declare the name of the political party with which he or she intends to affiliate at the ensuing primary election. The name of that political party shall be stated in the affidavit of registration and the index.
>
> The voter registration card shall inform the affiant that any elector may decline to state a political affiliation, and that all properly registered voters may vote for their choice at any primary election for any candidate for each office regardless of political affiliation and without a declaration of political faith or allegiance. The voter registration card shall include a list of all qualified political parties.

Pet.App. 89a-90a. The remainder of Proposition 198 works technical changes to the ballot[5] and the sample ballot.[6]

The result is a blanket primary where the primary voter is permitted to choose the nominees of any number of political parties at the same election, without regard to her own political affiliation or ideology. In other words, she may decide to vote for a Republican nominee for President, a Democratic nominee for Governor, a Libertarian nominee for United States Senator, etc. There is no party ballot; each voter receives the same ballot.[7] The parties have no way to know whether their "nominee" has been selected by party members or by others. The highest vote-getter under each party's label goes on to the general election regardless.[8]

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[4] The text of the ballot pamphlet concerning Proposition 198, including the text of the initiative, is located at J.A. 86-103; R.T. 636.

[5] Cal. Elec. Code §§ 13203, 13206, 13230; Pet.App. 91a-93a.

[6] Cal. Elec. Code §§ 13300, 13301, 13302; Pet.App. 93a-95a.

[7] There is one exception. The members of party county central committees, which perform certain statutorily-mandated tasks, are elected at primary elections. Only party members can vote in these elections. Cal. Elec. Code § 2151; Pet.App. 89a-90a.

[8] Cal. Elec. Code § 15451.

The ballot arguments in favor of Proposition 198 leave no doubt that the goal of its proponents was ideological, specifically, to produce more moderate candidates:

> It [the closed primary] favors the election of party hardliners, contributes to legislative gridlock, and stacks the deck against more moderate problem-solvers.
>
> * * *
>
> [Proposition 198] strengthens the parties by increasing voter participation and by electing candidates from both parties with broader bases of support.

J.A. 89; R.T. 636 [Argument in Favor]; J.A. 95; R.T. 636 [Rebuttal to Argument Against]. A significant part of the State's evidence at trial went to establish the fact that Proposition 198 would produce more moderate candidates. Defendants' expert David Olson, a political scientist from the University of Washington, testified:

> Q. . . . It is your opinion then that the blanket primary has produced more moderate candidates in Washington?
>
> A. Correct.
>
> Q. And as you have stated during your deposition, you think that's a good result, is that correct?
>
> A. That's correct.

R.T. 540 [Olson]. Defendants' expert Elisabeth Gerber, a political scientist at UC San Diego, said the same. R.T. 732-733 [Gerber].

With the adoption of Proposition 198, California joins a small group of states – Alaska, Washington, and Louisiana – that have blanket primaries. J.A. 55; R.T. 635-636 [Cain Report].

C. A Description of California's Minor Political Parties, Particularly Petitioners Peace and Freedom Party and Libertarian Party of California.

California has a long and rich history of minor parties. J.A. 39; R.T. 635-636 [Winger].[9] Minor parties have appeared on the statewide ballot in every partisan statewide California election in the last 120 years, with two exceptions. *Ibid.* There is substantial historical evidence that minor parties influence public policy. As stated by petitioners' expert on minor parties,

> many of the ideas advocated by the early minor parties, have long since been adopted as public policy. Collective bargaining rights, women's suffrage, direct election of U.S. Senators, the eight-hour day, abolition of child labor, anti-monopoly legislation, an end to segregation, the initiative, and other ideas, faced overwhelming hostility and opposition when they were first advocated. All these ideas were advocated by minor parties, decades before the major parties

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[9] Richard Winger, publisher of the *Ballot Access News*, submitted an expert report on minor parties. See J.A. 39-54; R.T. 635-636 [report]. His curriculum vitae is at Plaintiffs' Exhibit 5, pp. 10-11.

> accepted them, yet now we take them for granted.

J.A. 48-49; R.T. 635-636 [Winger].

Petitioners Peace and Freedom Party and Libertarian Party of California are explicitly ideological entities that embrace positions outside the current political mainstream. Party members are reconciled to the likelihood that these parties will win few elections to important policy-making positions in the near future. People join these parties because they want to support candidates who will give voice to their ideas and ideologies, with the hope of influencing public policy in the long run. J.A. 48; R.T. 635-636 [Winger]; J.A.57; R.T. 635-636 [Cain].[10]

The *Peace and Freedom Party* was organized in 1968 to nominate a presidential candidate who would oppose U.S. involvement in Vietnam. In 1971, it became the California branch of the Peoples Party, which advocated full rights for young people, the 30-hour week at 40 hours pay, free mass transportation, community board control over local police, an end to the draft, free medical care for everyone, the decriminalization of psychoactive drugs, abolition of the Universal Code of Military Justice, and a bill of rights for prisoners. In 1974, the party formally declared itself in support of socialism. J.A. 45; R.T. 635-636 [Winger]. The party platform advocates doubling

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[10] Professor Bruce Cain, Professor of Political Science at UC Berkeley, submitted an expert report and testified as an expert on the effect of Proposition 198 on political parties and on the outcome of primary elections. See J.A. 55-75 [report]; R.T. 342-460, 978-1002 [testimony]. His curriculum vitae is at Plaintiffs' Exhibit 6, pp. 32-39.

the minimum wage and indexing it to the cost of living; guaranteeing the right of all workers to organize and strike and forbidding striker replacement; abolishing NAFTA and GATT; abolishing the CIA, NSA, and AID; and allowing self-determination for all nations and peoples of the world, including Puerto Rico and all U.S. territories. J.A. 82; R.T. 635-636 [1996 Platform].

The Peace and Freedom Party sees little difference between the Republican and Democratic parties. As a party flier explains, "your real choice is between the capitalist, corporate-oriented Republicrats and the socialist, human-oriented Peace & Freedom Party." J.A. 84; R.T. 635-636 [party flier]. The party publishes a monthly newsletter that describes the party's position on a range of issues. Pl.Ex. 22; R.T. 635-636 [exemplars]. The party budget is less than $20,000 a year. R.T. 184 [Weber].

The *Libertarian Party* has a different political perspective. The party's Statement of Principles, unchanged since 1972, states in part:

> We hold that all individuals have the right to exercise sole dominion over their own lives, and have the right to live in whatever manner they choose, so long as they do not forcibly interfere with the right of others to live in whatever manner they choose.
>
> * * *
>
> Since governments, when instituted, must not violate individual rights, we oppose all interference by government in the areas of voluntary and contractual relations among individuals. People should not be forced to sacrifice their lives and property for the benefit of others.

> They should be left free by the government to deal with one another as free traders; and the resultant economic system, the only one compatible with the protection of individual rights, is the free market.

J.A. 76; R.T. 635-636. The party opposes involuntary taxation and would legalize victimless crimes. J.A. 46; R.T. 635-636 [Winger]. The Libertarian Party also sees little difference between the two major parties. With respect to the Second Amendment, the party has stated:

> It should be obvious by now that the Republicans are just as willing as the Democrats to throw away your constitutional rights – rights that were bought with the blood of American patriots.

J.A. 81; R.T. 635-636 [party flier].

The Libertarian Party is the first minor party to place its presidential candidate on all state ballots for two elections in a row since the Socialist Party did so in 1912 and 1916. J.A. 46; R.T. 635-636 [Winger]. The party publishes a monthly newsletter that describes the party's position on a range of issues. Pl.Ex. 21; R.T. 635-636 [exemplars]. Members of the party governing body must sign a pledge that "I hereby certify that I do not believe in or advocate the initiation of force as a means of achieving political or social goals." J.A. 79; R.T. 635-636; R.T. 153-155.

D. Proceedings Below.

Petitioners filed a complaint seeking to enjoin implementation of the new blanket primary law.[11] Named as defendant was Bill Jones, California Secretary of State, who is responsible for administering California election laws. See Cal. Gov't Code § 12172.5. Californians for an Open Primary intervened as a defendant. (Defendants will be referred to as "the State.")

The District Court conducted a four-day nonjury trial in the summer of 1997. The thrust of petitioners' case was that Proposition 198 violates the First Amendment right of political parties and their members to associate and to choose their own nominees. In addition to testimony from officials of the four political party plaintiffs, testimony was received from opposing teams of experts, one team testifying on behalf of plaintiffs and the other team testifying on behalf of defendants. The experts agreed on little, particularly when it came to quantifying the "burden" imposed on political parties by Proposition 198 and the extent to which Proposition 198 would further state "interests." However, the experts appeared to agree on two basic propositions: (1) under the new blanket primary law substantial crossover voting will occur (crossover voting occurs when a voter who is not registered

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[11] In addition to the political parties, plaintiffs included Art Torres, Chair of the California Democratic Party (R.T. 51-52); Michael Schroeder, Chair of the California Republican Party (R.T. 6-7); Gail Lightfoot, immediate past-chair of the Libertarian Party of California (R.T. 147-148); and C.T. Weber, Chair of the Peace and Freedom Party (R.T. 175).

with a party votes in that party's primary), and (2) crossover voting will change the results of an unknown number of primary races.[12]

The District Court awarded judgment to defendants. The District Court stated that political parties are already

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[12] Defendants' polling expert, Mervin Field, testified that a survey he conducted in the spring of 1997 (shortly before trial) showed that 37% of Republican voters planned to vote in the 1998 Democratic gubernatorial primary, that 20% of Democratic voters planned to vote in the 1998 Republican U.S. Senate primary, and that the preferences of crossover voters differed significantly from party voters. Pl.Ex. 8; R.T. 635-636 [Tables 1 and 3 of Addendum to Field Report]; R.T. 668-669. Defendant's expert Professor David Olson testified that in Washington (a blanket primary state) one-quarter to one-third of voters cast their entire ticket in one party, meaning that two-thirds to three-quarters crossover in at least one race in any given election. J.A. 136; R.T. 636 [Olson]. Defendants' expert Professor Jonathan Nagler estimated a Republican crossover in the 1992 Washington Senate race of twenty percent and a Democratic crossover rate of 24% in the 1996 Washington Secretary of State race. Def.Ex. H, p. 34; R.T. 635-636.

Plaintiffs' expert Professor Bruce Cain testified that under Proposition 198 "it is inevitable that parties will be forced in some circumstances to give their official designation to a candidate who is not preferred by a majority or even plurality of party members." R.T. 421. He explained the circumstances under which crossover voting is most likely to occur: "If one party has an uncontested race and the other a contested race, then voter who would normally participate in the uncontested race will feel more tempted to put their vote where it counts." J.A. 62; R.T. 635-636. Plaintiffs' expert on minor parties, Richard Winger, concluded that the rate of crossover voting in minor party primaries would be "much, much higher than in major party primaries." He noted that since 1968, 44 minor party primaries had been decided by fewer than 100 votes. J.A. 52-53; R.T. 635-636.

significantly regulated by the state and that the analogy between political parties and other private associations is therefore "imperfect at best." 984 F.Supp. at 1296 (Pet.App. 65a). As for crossover voting, the District Court concluded that

> [t]here will be a small number of elections in which the crossover vote proves decisive, and there will be other elections in which the possible importance of the crossover vote will be an influence on the conduct of the primary campaign and the conduct of elected officials.

984 F.Supp. at 1298 (Pet.App. 71a). According to the District Court, the majority of the crossover voting would be "benevolent" and in any event not significantly higher than the level of crossover voting in open primary states. *Ibid.* Ultimately, the District Court concluded that "the blanket primary imposes a significant but not severe burden on [petitioners'] associational rights." 984 F.Supp. at 1300 (Pet.App. 77a). Applying the balancing test articulated by this Court in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997), the District Court concluded that this burden was justified by several state interests, all of which "reduce to one fundamental contention: according to defendants, Proposition 198, like other Progressive Era reforms, enhances the democratic nature of the election process and the representativeness of elected officials." 984 F.Supp. at 1301 (Pet.App. 80a).

The Court of Appeals adopted the District Court's opinion and affirmed the District Court's judgment. 169 F.3d at 647-648 (Pet.App. 8a). The Court of Appeals later denied a petition for rehearing with suggestion for rehearing en banc. Pet.App. 87a.

E. Relevant Post-Trial Events.

After the adoption of Proposition 198, the Republican National Committee and the Democratic National Committee stated that their national party rules would not allow delegates to be seated at their national conventions who had been selected by the blanket primary. As a result, the California Legislature placed "Proposition 3" on the November, 1998 ballot. This measure would have created a closed primary solely for choosing delegates to each of the presidential nominating conventions.[13] The measure was defeated. The Legislature then amended the California Elections Code to require the reporting of presidential primary election returns in two ways: (1) by the total number of votes cast by all voters for each candidate, and (2) by the total number of votes cast by voters affiliated with the candidate's party. Cal. Elec. Code §§ 15151, 15373, 15500. The national parties will use the second count to apportion delegates to their presidential nominating conventions.

In February 1999 the Peace and Freedom Party ceased to be a ballot-qualified party in California because its registration had slipped below one percent of the previous total gubernatorial voted, and because no statewide candidate received at least two percent of the vote in the previous statewide election. Cal. Elec. Code § 5100; *see* also *Child of the '60s Slips*, Los Angeles Times, February 17, 1999, at B-6.

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[13] The text of Proposition 3 is available at the California Secretary of State's Vote98 website, online at http://vote98.ss.ca.gov/VoterGuide/Propositions/3text.htm.

SUMMARY OF ARGUMENT

Political parties play a unique role in promoting our national commitment to the principle that debate on public issues should be wide-open and robust; "they exist to advance their members' shared political beliefs." *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 629 (1996) (Kennedy, J., concurring and dissenting). The nomination of candidates is the central function of a political party because it is the nominees who, if successful at the general election, will advance the interests of party members. "[I]n the context of particular elections, candidates are necessary to make the party's message known and effective, and vice versa." *Ibid.*

Political parties enjoy freedom of association protected by the First Amendment. The freedom to associate "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). This is because "the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions[.]" *Ibid.* A political party's right to choose its own nominees is core associational activity. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359-360 (1997).

California's new blanket primary law, Proposition 198, strikes at the very heart of party associational rights. A blanket primary is the only primary system that allows a voter to join in a party's nominating process without requiring *any* act of affiliation with the party. Proposition 198 will inevitably lead to the selection of party "nominees" who are supported by neither a majority nor a

plurality of party members. It is no response to say, as did the District Court, that "in the typical election, the cross-over vote will not be decisive." 984 F.Supp. at 1300 (Pet.App. 76a). The other side of that coin is that in an unknown number of cases, the crossover vote will be decisive. The goal of Proposition 198 is to make crossover votes count and to give non-party members a significant role in choosing party nominees. This is precisely what violates the First Amendment.

Proposition 198 will be particularly debilitating to minor parties. The two minor party petitioners in this case – the Libertarian Party of California and the Peace and Freedom Party – are small ideological organizations that occupy opposite ends of the political spectrum. Both are outside the political mainstream because they want to be outside the mainstream; both find the major parties hypocritical and essentially indistinguishable. Party members have banded together to pursue their own distinctive ideologies with the hope of winning public support and influencing public policy. Proposition 198 will allow the entire California electorate to join in the minor party nominating process, flooding the minor party primaries with voters who know nothing about the parties' ideologies. In the most fundamental way, the blanket primary denies minor party members the right to choose their own nominees and to pursue their own shared political interests.

The District Court's conclusion that "at least the major political parties lack the unity of purpose and cohesive membership characteristic of most private organizations" (986 F.Supp. at 1296 (Pet.App. 65a)) has potentially extreme consequences. To the extent that major

parties lack attributes of other private associations, it is because political parties are already significantly regulated by state law. In particular, they are required to choose their nominees by primary election. But if each new restriction of party associational rights can be justified to pointing to the previous restriction, party associational rights can be completely extinguished. The decision in this case, which ratifies a radical incursion into party associational rights, raises the specter of state-run parties.

The State has wide latitude to regulate elections to ensure that they are fair and honest. But the State cannot first require parties to nominate by primary election, and then structure the primary elections to deprive the parties of their First Amendment rights. California need not have a primary system at all. But if California chooses to conduct primary elections, it must respect the political parties' freedom of association. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 218 (1986).

ARGUMENT

I. The Primary Is the Major Theater for Resolving Ideological Struggles Within a Political Party. For That Reason, a Party's Right to Define its Membership and to Choose its Own Nominees Is a Basic Freedom of Association Protected by the First Amendment.

A political party has been aptly described as:

> a voluntary association, instituted for political purposes, with the goal of effectuating the will

> of its members. The party's ultimate goal, in the electoral process, is to obtain control of the levers of government by winning elections, so that it may then put into operation its policies and philosophies. . . . In order to accomplish this goal, the party seeks to nominate those candidates who are most likely to win the general election, while remaining most faithful to the party's (i.e., its members') policies and philosophies. *The party's selection of its candidates therefore is an ultimate and crucial element of the party members' political activities.*

Nader v. Schaffer, 417 F.Supp. 837, 847 (D.Conn. 1976) (citations omitted, emphasis added), *aff'd*, 429 U.S. 989 (1976).

The nominating process is the major theater for resolving ideological struggles within a party. The single most important way that a party defines and advances the interests of its members is through the choice of nominees:

> The First Amendment embodies a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." Political parties have a unique role in serving this principle; they exist to advance their members' shared political beliefs. A party performs this function, in part, by "identify[ing] the people who constitute the association, and . . . limit[ing] the association to those people only." *Having identified its members, however, a party can give effect to their views only by selecting and supporting candidates.* A political party has its own traditions and principles that transcend the interests of individual candidates and campaigns; but in the context of particular

> elections, candidates are necessary to make the party's message known and effective, and vice-versa.

Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n, 518 U.S. 604, 629 (1996) (Kennedy, J., concurring and dissenting) (emphasis added, internal citations omitted); *see also id.* at 615-616 (lead opinion of Breyer, J.) ("A political party's independent expression not only reflects its members' views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those members in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure"). The importance of nominations in shaping party policy cannot be overemphasized. As E.E. Schattschneider said in his classic 1942 study of American parties, "[t]he nature of the nominating procedure determines the nature of the party; he who can make the nominations is the owner of the party." E.E. Schattschneider, *Party Government* (Rinehart 1942) at p. 64.

It is now well settled that political parties enjoy freedom of association protected by the First Amendment. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997). The freedom to associate "necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). As this Court explained in *La Follette*:

> On several occasions this Court has recognized that the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions – thus impairing the party's essential functions – and that political parties may accordingly protect themselves "from intrusion by those with adverse political principles."

Ibid. The freedom to associate also protects a party's right to select a " 'standard bearer who best represents the party's ideologies and preferences.' " *Eu v. San Francisco Democratic Central Comm.*, 489 U.S. 214, 224 (1989) (quoting *Ripon Society, Inc. v. National Republican Party*, 525 F.2d 567, 601 (1975) (Tamm, J., concurring in the result), *cert. denied*, 424 U.S. 933 (1976)).

To be sure, states have broad regulatory power over the conduct of elections. *Tashjian, supra*, 479 U.S. at 217. This power is founded both on the Time, Place and Manner clause of Article I, Section 4,[14] and on the commonsense recognition that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 712, 730 (1974). But the power to regulate must be exercised without infringing upon "basic constitutional protections." *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973). Rather,

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[14] Article I, Section 4, Clause 1 states: "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

> [w]hen deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the " 'character and magnitude' " of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's " 'important regulatory interests' " will usually be enough to justify " 'reasonable, nondiscriminatory restrictions.' "

Timmons, supra, 520 U.S. at 358 (internal citations omitted).

II. Proposition 198 Is a Severe Burden on Party Associational Rights Because it Forces a Political Party to Open its Nominating Procedure to Voters Who Have Absolutely No Affiliation with the Party.

A. *Tashjian* Controls the Result Here.

The District Court stated that "[p]erhaps the closest case is [*Tashjian*], but in *Tashjian* the Court addressed the reverse of the situation presented here[.]" 984 F.Supp. at 1293 (Pet.App. 58a). *Tashjian* is indeed the closest case and it controls the result here.

Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) addressed the question whether Connecticut could enforce a closed primary law on a political party that sought to open up its primary to independent voters.

Connecticut had used a closed primary system for many years. *Id.* at 211-212. Noting that many voters were not affiliated with a party, the Republican Party in 1984 adopted a rule opening its primary to unaffiliated voters and then sued to enjoin the closed primary law. *Id.* at 212-213. A federal District Court entered summary judgment enjoining application of the closed primary statute to the Republican party. *Republican Party of Connecticut v. Tashjian*, 599 F.Supp. 1228 (D.Conn. 1984). The Second Circuit affirmed, *Republican Party of Connecticut v. Tashjian*, 770 F.2d 265 (2d Cir. 1985), as did this Court.

This Court's opinion in *Tashjian* began by analyzing the magnitude of the constitutional burden. The Court observed that "[t]he Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution." *Id.* at 224. The closed primary law trenched on the party's associational rights by

> plac[ing] limits upon the group of registered voters whom the Party may invite to participate in the "basic function" of selecting the Party's candidates. The State thus limits the Party's associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community.

Id. at 215-216 (internal citation omitted). Having reached that conclusion, the Court closely reviewed Connecticut's justifications for the closed primary law. Finding the proffered interests inadequate, the Supreme Court held the statute unconstitutional as applied to the Republican Party. *Id.* at 225.

This Court recently reaffirmed its holding in *Tashjian*. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) upheld a Minnesota law barring fusion candidates.[15] *Timmons* stressed that "[t]he New Party's claim that it has a right to select its own candidate is uncontroversial, so far as it goes. . . . *That is, the New Party, and not someone else, has the right to select the New Party's 'standard bearer.'* " *Id.* at 359 (internal citation omitted) (emphasis added). *Timmons* went on to state that "while *Tashjian* and *Eu* involved regulation of political parties' internal affairs and core associational activities, Minnesota's fusion ban does not." *Ibid.* Thus *Timmons* makes clear that *Tashjian* is still good law and that it stands for the proposition that a political party's nominating process is core associational activity that is protected by the First Amendment.

The District Court's opinion cannot be reconciled with *Tashjian*. There is nothing peculiar to California parties that would make them less entitled than Connecticut parties to protection of their associational rights at the time of nominating their candidates, "the crucial juncture at which the appeal to common principles may be translated into concerted action[.]" *See Tashjian, supra*, 479 U.S. at 215-216. Nor is there anything peculiar to California about the numerous state interests allegedly served by the blanket primary. The District Court noted that all these various interests boil down to one contention: The blanket primary will enhance the democratic nature of elections and the representativeness of public officials.

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[15] Fusion is "the nomination by more than one political party of the same candidate for the same office in the same general election." *Id.* at 354, fn. 1.

984 F.Supp. at 1301 (Pet.App. 80a). Any state could and would make the same claim about virtually any change to its primary system.

Further, the associational right asserted here is if anything much stronger than the right asserted in *Tashjian*.[16] Petitioners in the present case seek to choose *their own* nominees; they seek to limit the nominating process to those who have affiliated with a party and "to protect themselves 'from intrusion by those with adverse political principles.' " *La Follette, supra*, 450 U.S. at 122 (interior citations omitted). This is precisely the right protected by the First Amendment, the right to choose a standard bearer who best represents *the party's* ideologies and preferences. *Eu, supra*, 489 U.S. at 224. On the other hand, the Connecticut Republican Party sought to allow *outsiders* to join in the nomination process. *Tashjian, supra*, 479 U.S. at 235 (Scalia, J., dissenting) ("The Connecticut voter who, while steadfastly refusing to register as a Republican, casts a vote in the Republican primary, forms no more meaningful an 'association' with the Party than does the independent or the registered Democrat who responds to questions by a Republican Party pollster").

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[16] It is also much greater than that asserted in *Timmons*. *Timmons* noted that the fusion ban at issue there "reduce[s] the universe of potential candidates who may appear on the ballot as the Party's nominee only by ruling out those few individuals who both have already agreed to be another party's candidate and also, if forced to choose, themselves prefer that other party." *Timmons, supra*, 520 U.S. at 363. Proposition 198 allows those not affiliated with the party to cross over and vote in every party primary election.

B. The New Blanket Primary Law Is More Intrusive of Party Associational Rights than Any Other Nominating Procedure.

The District Court's conclusion that Proposition 198 imposes a "significant but not severe" burden on party associational rights has no support in precedent, in the record, or in common sense. 984 F.Supp. 1300-1301 (Pet.App. 77a). Consider the following comparison:

The Constitutionally-Protected Right	Proposition 198
"[T]he [party], and not someone else, has the right to select the [party's] 'standard bearer.' " *Timmons, supra*, 520 U.S. at 359.	The voter registration card shall inform the affiant that . . . *all properly registered voters may vote for their choice at any primary election for any candidate for each office regardless of political affiliation and without a declaration of political faith or allegiance.* Cal. Elec. Code § 2151 (emphasis added).

Proposition 198 is not a slight restraint, it is not a minor imposition, it is not a glancing blow. It is a full-scale, head-on, point-blank assault.

It is simply no response to say that "in the typical election, the cross-over vote will not be decisive." 984 F.Supp. at 1300 (Pet.App. 76a). The point is that some 400 to 600 party nominees are chosen during each two-year election cycle in California, and some unknown number

of them will now be chosen by voters who have no affiliation with the party.[17] Nor is it any response to say that the crossover voting will likely be "benevolent."[18] 984 F.Supp. at 1298 (Pet.App. 71a). Regardless of the motive, the result is that non-party members play a role, on occasion a decisive role, in choosing a party's nominee. Republican political consultant Sal Russo said it well when he stated:

> Q. . . . How do you define who's the best candidate; how do we know who the best candidate is for the Republican Party?
>
> A. Well, I'm defining quite clearly the best candidate [as] the candidate the party wants, even though I may not be particularly keen on the choice. I think the party has that – that's what the party's most important function is, I think, is to select our candidate.

R.T. 304. Former California Republican Party Chair Robert Naylor added:

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[17] In each two-year cycle, California elects 80 Assemblymembers, 20 State Senators, and 52 Congressmembers. Depending on the year, Statewide, Board of Equalization, and U.S. Senate races may also be on the ballot. As a general rule, there will be at least three party primaries for each office: a Republican primary, a Democratic primary, and a minor party primary.

[18] The term "benevolent cross-over voting" was not used by any of the expert witnesses. Apparently the District Court used the term to combine voters who cross party lines to vote for their first choice candidates with voters who vote strategically for their second choice. R.T. 353-356; J.A. 61-65; R.T. 635-636 [Cain – describing strategic voting].

> But [Proposition 198] will have a deleterious effect on the morale of those volunteers and members of the party who expect everybody's shoulder to be at the wheel.
>
> When you are in a boat and a couple people have oars but aren't rowing very hard because they fundamentally don't agree with the direction the boat is going, it slows the boat down.

R.T. 206.

The District Court also concluded that a blanket primary does not differ from an open primary in that both allow crossover voting, and that a decision invalidating Proposition 198 would necessarily invalidate the primary systems of perhaps 35 states that apparently use some form of open primary. 984 F.Supp. at 1291-1295 (Pet.App. 53a-63a). This conclusion is uncritical and wrong. A blanket primary differs significantly from an open primary. A blanket primary is the only primary system that allows a voter to join in a party's nominating process without making any act of affiliation with the party. As Justice Powell noted in *La Follette*:

> [T]he act of voting in the Democratic primary fairly can be described as an act of affiliation with the Democratic Party. The real issue in this case is whether the party has the right to decide that only publicly affiliated voters may participate.
>
> The situation might be different in those States with "blanket" primaries – i.e., those where voters are allowed to participate in the primaries of more than one party on a single occasion, selecting the primary they wish to

vote in with respect to each individual elective office.

450 U.S. at 130, fn. 2 (Powell, J., dissenting). It may be that open primary systems in other states will present questions as to what constitutes a sufficient act of affiliation with a party.[19] The answer to those questions can await a case that presents them.

The District Court's comments on crossover voting rates in various primary systems were based on the testimony of a single witness, Jonathan Nagler, an Associate Professor of Political Science at the University of California, Riverside.[20] R.T. 767. With all due respect to Professor Nagler, his testimony was based on numerous assumptions and definitions, all of them the subject of debate. He described his review of the academic literature as "a brief review of a brief literature." Def.Ex. H, p. 4; R.T. 636. He defined "crossover voter" to exclude independent voters who voted in a party primary. R.T. 796. He also defined "crossover voter" to include voters who

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[19] The elections systems of the 50 states present numerous subtle variations that do not lend themselves to easy classification. Experts differ as to how to define the terms "open primary" and "closed primary," and all classification systems use subcategories like "semi-open" and "semi-closed." Compare Plaintiffs' Exhibit 7, pp. 2-3, R.T. 635-636 [Costantini Report] with Defendants' Exhibit E, pp. 2-4, R.T. 636 [Gerber Report]. See also Bibby, *Politics, Parties, and Elections in America* (Nelson-Hall, 3rd ed. 1996) at p. 134 [chart].

[20] The District Court did not make findings of fact, and certainly did not make any findings concerning crossover voting. The District Court did, however, cite to various reports, particularly Professor Nagler's. 984 F.Supp. at 1298 (Pet.App. 72a).

voted with the party in which they were registered, but who later stated in an exit poll that they affiliated with another party. R.T. 800. His study employed a "cutting edge" methodology that "didn't exist literally on this planet three or four years ago." R.T. 795. His testimony was plagued by questions as to whether the primaries in the states that he studied should be termed "open" or "closed."[21] Accordingly, his testimony cannot be the basis for any definitive opinion on crossover voting rates.

The District Court also concluded that "at least the major political parties lack the unity of purpose and cohesive membership characteristic of most private organizations." 986 F.Supp. at 1296 (Pet.App. 65a). The District Court noted that voters who register in a party do not pay dues and do not take an oath, they merely sign a registration card. *Ibid.* However, it should be noted that parties are not restrictive about their membership precisely because they are prohibited by law from being restrictive. California law allows any qualified voter to state an affiliation with a political party by signing a

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[21] Professor Nagler classified Ohio as an open primary state, and concluded that there was substantial crossover voting in Ohio. Def.Ex. H, p. 34; R.T. 636. But it turned out that Ohio allows same-day registration, and the voters that Professor Nagler counted as crossovers were actually re-registering in the party in whose primary they were voting. R.T. 822 [Nagler]. Thus the question: if someone changes party registration on election day and votes in the primary of his new party, is that voter a crossover voter? Professor Nagler's answer was "yes," though he conceded that one could just as easily answer the question "no," in which case the crossover voting rate in Ohio would be "zero." R.T. 824-825 [Nagler].

registration card.[22] Left to their own devices at an earlier point in this country's history, parties were considerably more restrictive. Samuel Adams' description of a caucus meeting antedates the Revolution:

> This day learned that the Caucus Club meets at certain times in the garret of Tom Dawes, the Adjutant of the Boston Regulars. He has a large house . . . and the whole club meets in one room. There they smoke tobacco till you cannot see from one end of the garret to the other. There they drink flip I suppose and they choose a moderator who puts questions to the vote regularly; and selectmen, assessors, collectors, fierwards, and representatives are regularly chosen before they are chosen in town. . . .

Bone, *American Politics and the Party System* (1949) at 507; quoted in L. Friedman, "Reflections Upon the Law of Political Parties," 44 Cal.L.Rev. 65 (1956). Public dissatisfaction with the caucus system led to Progressive Era reforms such as the Australian ballot, the direct primary, and the current registration system. But a new Draconian restriction of party rights (the blanket primary) cannot be justified by pointing out that party rights are already restricted in some respects. This approach would legitimate a complete extinction of party associational rights, so long as the extinction were accomplished incrementally.

While the District Court was correct to note that the American experience has required accommodation between party associational rights and state power to

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[22] Cal. Elec. Code § 2151.

regulate the election process, the decision below results in nullification, not accommodation. The blanket primary is the nominating process most intrusive into party associational rights because it denies the very existence of those rights. If a party's First Amendment right to "choose the standard bearer of its choice" does not protect it from a blanket primary, that right is nothing more than a mirage. *See Eu, supra*, 489 U.S. at 224.

Finally, it is more than a little disturbing that Proposition 198 has been promoted and defended as producing more moderate candidates. To borrow respondents' antiseptic phraseology from the proceedings below, under the blanket primary, nominees will "stand closer to the median policy positions of their districts[.]" Appellee's and Intervenor's Brief in the Court of Appeals [6/25/98] at 51. This may be so, but a constitution that holds that "[t]he *independent* expression of a political party's views is 'core' First Amendment activity" does not permit California to force upon a party a nominating procedure that robs it of that independence. *See Colorado, supra*, 518 U.S. at 616 (emphasis added). Any other conclusion raises the troubling specter of state-run parties.

C. The New Blanket Primary Law Has a Particularly Severe Effect on Minor Parties.

Proposition 198 will be most debilitating to California's Peace and Freedom and Libertarian parties and to other minor parties. These parties are explicitly ideological entities that at least for the present are outside the mainstream of American politics. The Peace and Freedom Party is to the left of the spectrum, the Libertarian Party

(generally speaking) to the right. One thing the two parties have in common is that they see no significant difference between the two major parties. Yet the blanket primary now allows several million major party members to join in selecting the nominees for each of these minor parties.[23]

It appears that the drafters of Proposition 198 gave no consideration to its effect on minor parties. The ballot pamphlet does not even mention the minor parties, and many of the ballot pamphlet arguments in support of Proposition 198 seem irrelevant to them. For example, stating that Proposition 198 "[e]ncourages candidates to address issues" is not a meaningful statement to people who have formed their own partisan organizations to address issues.[24] Stating that Proposition 198 "[g]ives control back to voters" is not a meaningful statement to voters who are disgusted with the major parties and have formed associations to advance unpopular ideologies.[25] And stating that Proposition 198 "[s]trengthens the parties by increasing voter participation and by electing candidates from *both* parties with broader bases of support" concedes the major premise of this paragraph: the drafters of Proposition 198 gave no thought to its effect

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[23] The Peace and Freedom Party ceased to be a ballot-qualified party in California as of February 1999. That fact does not moot this case as to the Peace and Freedom Party because the party may register enough voters to re-qualify for the ballot.

[24] J.A. 95; R.T. 636.

[25] *Ibid.*

on minor parties, none of whom want to strengthen the major parties.[26]

"Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike[.]" *Jenness v. Fortson*, 403 U.S. 431, 441-442 (1971). Under Proposition 198, both major party candidates and minor party candidates must appeal to an electorate of 15 million people during the primary. Leaving aside the issue whether major party candidates have the resources to make such an appeal, minor party candidates clearly do not. Newspapers and broadcasters generally do not cover minor party races. J.A. 50; R.T. 635-636 [Winger]. Minor party candidates in important contested elections reach party members by mail, and the minor parties themselves reach party members through their newsletters. R.T. 624-625 [Winger]; Pl.Ex. 29 [Peace and Freedom newsletters]; Pl.Ex. 11 [Libertarian newsletters]. The minor parties and their candidates cannot afford to send mailings to the entire electorate.[27] As a result, non-party members voting in minor party primaries will almost certainly lack any knowledge of the candidates that they vote for. J.A. 53; R.T. 635-636 [Winger].

Petitioners' expert on minor parties, Richard Winger, concluded that under Proposition 198 there will be a dramatic increase in voting in minor party primary races, and that the new voters will not be party members:

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[26] *Ibid.* (emphasis added).

[27] The budget of the Peace and Freedom Party is "[p]robably less than $20,000 a year." R.T. 184. Neither the chair of the Libertarian Party nor the chair of the Peace and Freedom Party has a staff. R.T. 166, 184.

> In my opinion, if the new California primary law goes into effect, the vote for minor party candidates in primary elections will be *much* higher than it has been in the past. The new voters will not be party members. As a general proposition, I believe that minor party members voting in their own primary will be outnumbered by non-party members. Even where they are not outnumbered, the proportion of non-party voters will be very high – much, much higher than in major party primaries.

J.A. 53; R.T. 635-636. As it turns out, Mr. Winger hit the nail right on the head.

The June 1998 primary was the first election conducted under Proposition 198. The results of that election show massive crossover voting in several minor party primaries:[28]

Insurance Commissioner

Condit, P&F (Peace & Freedom)	72,535
Ramos, P&F	86,772
Total votes cast in P&F primary	**159,307**
Total P&F registration in district	**71,620**

[28] All the election results cited below are found in *Statement of Vote, Primary Election, June 2, 1998* (California Secretary of State, 1998) and are available on line at http://primary98.ss.ca.gov/Final/Official_Results.htm. The registration figures are found in *Report of Registration, May 1998* (California Secretary of State, 1998) and are available on line at http://www.ss.ca.gov/elections/elections_u.htm. The results of the 1998 primary are not in the record because the election took place 10 months after trial.

Congress, 1st District

Oglesby, Lib (Libertarian)	1,864
Rossi, Lib	2,489
Total votes cast in Lib primary	**4,333**
Total Lib registration in district	**1,939**

Assembly, 77th District

Metti, Lib	1,138
Meyers, Lib	2,331
Total votes cast in Lib primary	**3,469**
Total Lib registration in district	**1,264**

In each of these races, votes cast in the minor party primary exceeded minor party registration by a ratio of more than two-to-one. Without casting aspersions on any of the candidates for these offices, how can one say that any one of them is the "nominee" of his or her party?

Minor parties play an important part in a democracy:

> All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society.

Sweezy v. New Hampshire, 354 U.S. 234, 251 (1957). With Proposition 198 California takes a major step toward stifling the voices of minor parties.

III. The State Has Not Met Its Burden Of Showing That Proposition 198 Is Narrowly Tailored To Advance A Compelling State Interest.

Election regulations imposing severe burdens on First Amendment rights must be narrowly tailored and must advance a compelling state interest. *Timmons, supra*, 520 U.S. at 358. The State has the burden of proof on both issues. *Eu, supra*, 489 U.S. at 222. The State has met its burden on neither.

We will discuss in order the handful of interests advanced by the State in the Court of Appeals. That Court adopted the District Court's conclusion that all the interests "reduce to one fundamental contention: according to defendants, Proposition 198, like other Progressive Era reforms, enhances the democratic nature of the election process and the representativeness of elected officials." 169 F.3d at 660; Pet.App. 39a. This mega-interest, like many of the subsidiary interests it subsumes, is a predictive judgment not readily susceptible of proof. *Timmons, supra*, 520 U.S. at 361. It cannot justify the burdens imposed by Proposition 198.

Producing candidates more reflective of the general electorate. This is another way of stating that the blanket primary will produce more "moderate" candidates. Pursuing moderation in party nominations is not a legitimate state interest, much less a compelling one. As the Supreme Court has repeatedly stated, political parties

have associational rights, and one of those rights is the right to choose the standard bearer that best represents *the party's* ideology. *Eu, supra*, 489 U.S. at 224.

The State certainly has wide latitude to regulate elections to ensure that they are fair and honest. *Storer, supra*, 415 U.S. at 730. But the State cannot first require parties to nominate by primary election, and then structure the elections to deprive the parties of their First Amendment rights. California need not have a primary system at all. But if California chooses to conduct partisan primary elections, it must respect the political parties' freedom of association.[29] *Tashjian, supra*, 479 U.S. at 218.

Providing a voice to disenfranchised voters. The theory here is that minority party members who live in "safe" districts (districts where the minority party has little chance of winning) and independent voters are "disenfranchised." According to the State, the minority party members are disenfranchised because they can't vote in the election that counts (the partisan primary of the majority party) and independents are disenfranchised because they can't vote in any partisan primary. *See generally* J.A. 189-192; R.T. 636 [Quinn].

At the outset it should be noted that the State's use of the term "disenfranchised" is idiosyncratic. The State's

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[29] Abolishing the primary system would require an amendment to the California Constitution. Article II, section 5 of the California Constitution states that the Legislature "shall provide for primary elections for partisan offices[.]" All judicial, school, county, and city offices are nonpartisan. Cal. Const. Art. 6(a). The rest are partisan. Proposition 198, a statutory initiative, did not amend these constitutional provisions.

expert admitted that "this is not a legal term," and indeed it is not. R.T. 888 [Quinn]. All registered voters in California can vote in the general election, and all can choose to affiliate with a party and then participate in that party's primary election. If they find themselves unable to vote in a particular party primary, it is a result of their own decision. They are not "disenfranchised." *Nader, supra,* 417 F.Supp. at 847, *aff'd,* 429 U.S. 989 (requiring party enrollment before voting in partisan primary is not an absolute barrier to voting). Further, what might be a "safe" seat for one party today may not be tomorrow. R.T. 885 [Quinn].

The very concept of a political party presupposes the exclusion of those who do not share the interests of the party. Parties seek to advance their members' *shared* political beliefs. *Sweezy, supra,* 354 U.S. at 250. It is therefore inevitable that in a state like California, which requires parties to nominate by direct primary election, a blanket primary law will run head-on into the First Amendment. But this does not allow California to leverage its control over elections into control over the parties.

Increasing voter participation. This is simply a predictive judgment. It is by no means clear that the blanket primary would increase voter turnout. In determining turnout level, "the type of primary is a marginal factor." J.A. 69; R.T. 635-636 [Cain]. Further, there are more narrowly tailored and less intrusive means to increase voter turnout, such as allowing registration closer to the date of the primary. J.A. 68; R.T. 635-636 [Cain]. As one State expert stated, "If you were looking for the best tool to increase turnout this [the blanket primary] is not what you would pick." R.T. 1013 [Nagler].

Broaden debate on public issues. Assuming for the purpose of argument that this is a compelling interest, there is no reason to believe that Proposition 198 will advance it. "In fact, there are many informed observers who think that the problem in California is exactly the opposite: i.e., they lament the lack of distinct choices in American politics and feel that the system shuts out legitimate points of view that do not fall in the middle of the ideological spectrum." J.A. 66; R.T. 635-636 [Cain]. Evidence suggests that the blanket primary will suffocate those at the extreme of the ideological spectrum, the minor parties. J.A. 53-54; R.T. 635-636 [Winger]; R.T. 718-719 [Gerber].

Preserving voter privacy. There is absolutely no evidence in the record that invasions of voter privacy have been a problem in California. There is certainly no mention of this "interest" in the ballot pamphlet. This is a post-hoc rationalization.

Assuming that preserving voter privacy is a compelling interest, Proposition 198 does not promote that interest. Under the previous closed primary system, no one other than the voter knew how a particular vote was cast. All that was publicly known was the voter's party affiliation. Proposition 198 changes none of this. Partisan registration still exists and that information is still public. How a voter casts his ballot is still private. Further, there are less restrictive means available to pursue this interest. For example, the State could minimize public access to voter registration records.

In sum, the State's interests here reduce down to several which are speculative and one – the desire to

produce more "mainstream" or "moderate" candidates – which is fundamentally at odds with the First Amendment rights of each political party to choose a representative which best represents the ideological views of the party, *as defined by the party.*

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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